

February 13, 2003

Jordan Goldstein, Senior Legal Advisor, Commissioner Copps

Dan Gonzalez, Senior Legal Advisor, Commissioner Martin

Lisa Zaina, Senior Legal Advisor, Commissioner Adelstein



BY EMAIL

Re: Triennial Review
Docket No. CC 01-338

Dear Jordan, Dan, and Lisa:

Rumors have circulated in the press of a proposed *Order* which would preserve the bulk of existing UNE-P rules but exempt the ILECs from almost any obligations for any fiber they pull to residential homes (we understand that some safeguards would remain to protect pure voice service).

We applaud a recognition that what competition that exists in the broadband and telephony markets relies on the continuation of the existing access rules promulgated under Section 251 and that, accordingly, the bulk of the regulations governing such access should not be eliminated or radically altered. Media Access Project, in consultation with Mark Cooper of Consumer Federation of America, would like to express the following thoughts, concerns and suggestions on this rumored compromise.

First and foremost, MAP and CFA continue to believe that a prohibition of discrimination based on content must continue to be the ironclad rule of communications networks in the United States. This does not, however, mean a requirement for common carriage or price regulation. It is thus perfectly reasonable and consistent, if the Commission exempts future residential fiber build outs by the ILECs from Section 251 requirements, to prohibit any kind of content discrimination. Indeed, such a prohibition is compelled by basic First Amendment principles guaranteeing to the citizens of this country a “paramount” right of access to information from the greatest diversity of sources. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

Second, any exemption for new construction should not be based on speed or on age of construction. It is true that, because the copper communications networks of the ILECs were built with money guaranteed a rate of return as an insulated monopoly, remedial regulation to encourage competition is particularly warranted. But the true basis for the regulation of communications networks as common carriers does not lie with the question of whether the network was built with private at-risk capital or with guaranteed returns.

Rather, Congress and the Courts have traditionally imposed common carriage obligations on communications networks because such networks constitute the life’s blood of democracy and economic development. As a matter of public policy, Congress has refused to allow the essential networks of the nation – whether they be rail, roads, or telecommunications – to have unfettered freedom to discriminate and thus impede both the flow of goods and, more importantly in a democracy, the flow of information.

In this case, the Commission may determine that the public interest is best served by

encouraging the speedy deployment of advanced telecommunications services to all Americans by forbearing from applying Section 251 to new fiber construction to the home. Section 706 of the Telecommunications Act of 1996 explicitly envisions such a course of action. But this is not based on age, speed of the network, or the nature of the investment capital. It is a value judgment as to what best serves the public interest using the framework set forth in the Communications Act of 1934, as amended.

Accordingly, if the Commission does decide to forbear to fulfill the goals of Section 706, the Commission should make explicit that it reserves the right to revisit this decision as circumstances dictate. If promised competition should fail to emerge, or if the public interest should for other reasons demand, that the Commission impose necessary regulation on new fiber to the home, the Commission must make clear that it retains the power to do what it finds necessary.

Finally, while the source of the capital should not effect the public interest analysis, interests of equity should prohibit rate payers from subsidizing investments in new, unregulated facilities. If the Commission decides that ILECs need the freedom of the unregulated market to invest, they must rely upon that same market for returns. Not only is this equitable, it is common sense. If ILECs can count on ratepayers to subsidize investments in fiber, the ILECs will have little incentive to manage these new investments efficiently.

Sincerely,

Harold Feld
Associate Director